MOTION FILED

NOV 2 4 2003

No. 03-366

IN THE

Supreme Court of the United States

NEW ORLEANS STEVEDORES AND
SIGNAL MUTUAL ADMINISTRATION LTD.,
Petitioners,

v.

PEGGY IBOS, Surviving Spouse of Bertrand Ibos, Jr., and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONERS

CHARLES THOMAS CARROLL, JR.*
F. EDWIN FROELICH
CARROLL & FROELICH, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

No. 03-366

NEW ORLEANS STEVEDORES AND
SIGNAL MUTUAL ADMINISTRATION LTD.,
Petitioners,

v.

PEGGY IBOS, Surviving Spouse of Bertrand Ibos, Jr., and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37(b) of the Supreme Court of the United States, the National Association of Waterfront Employers ("NAWE") moves for leave to file the brief *amicus curiae* in support of Petitioners for the reasons stated below.

NAWE is a nationwide §501(c)(6) association of private sector marine terminal operators/stevedores whose member companies hire the longshore labor to load and unload vessels at the vast majority of general cargo and container terminals in the U.S. NAWE members comprise a substantial block of the employers covered by the Longshore and Harbor Work-

ers' Compensation Act ("LHWCA" or "Act"), and the longshore employees hired by NAWE members on a daily basis to handle the cargo likely comprise a majority of the employees covered by the Act on any given day.

NAWE members take seriously their LHWCA financial obligation to provide for, and insure against, employee claims for work related injuries and illnesses, and take just as seriously the statutory and regulatory safety and health obligations required both by the LHWCA and the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* to prevent work related injury and illness. NAWE members fully appreciate that the strict application of OSHA's vertical safety and health standards, as set forth at 29 C.F.R. §§ 1917 & 1918, has had, and continues to have, a positive impact on reducing the number of LHWCA claims. The industry funds, through regional employer collective bargaining associations, significant industry safety programs with the important goal of reducing work related injuries and illnesses. Viewed another way, the high cost of LHWCA claims acts as an incentive to fully implement industry safety programs.

Therefore, all NAWE members have a direct interest in having this Court fashion a rule of maritime law in the so-called 'last employer' arena that takes into account the negative impact that the blind application of the rule, as in the circumstances below, will have on an employer's incentive to maintain viable safety programs. If an employer is going to be held liable for a LHWCA claim merely because it is designated the 'last employer' by Department of Labor administrative process, despite, as below, substantial evidence in the record to the contrary, *amicus* questions whether, in this circumstance, any incentive remains for an employer to maintain a serious safety program.

To be sure, *amicus* stresses that NAWE members wish to preserve the 'last employer' rule in those circumstances where the evidentiary record properly supports the desig-

nation of a 'last employer' as the liable employer. Every NAWE member appreciates the fact that, at one time or another, each 'will have its turn in the barrel' and be so designated the 'last employer.'

NAWE filed the brief *amicus curiae* below in support of Petitioner.

Respectfully submitted,

CHARLES THOMAS CARROLL, JR.*
F. EDWIN FROELICH
CARROLL & FROELICH, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

* Counsel of Record

Counsel for Amicus Curiae

QUESTION PRESENTED

In the decision below, the Court of Appeals held an employer liable for the payment of benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA" or "Act") where the employer proved by uncontradicted scientific evidence that it was not in any way responsible for causing, aggravating or otherwise affecting the employee's disability or death due to asbestos-related mesothelioma. The question presented is:

Whether section 2(2) of the LHWCA, 33 U.S.C. § 902(2), authorizes the imposition of liability for benefits on an employer that proves it had no role in causing an employee's occupational disease?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE *CARDILLO* LAST EMPLOYER RULE ("*CARDILLO* RULE") IS AN EXTRA STATUTORY DEVICE CREATED BY THE FEDERAL COURTS AS PART OF THE SUBSTANTIVE MARITIME LAW OF THE UNITED STATES, AND NOW NEEDS TO BE REVIEWED AND MODIFIED BY THE COURT.	3
II. THE PETITION SHOULD BE GRANTED SO THAT THE *CARDILLO* RULE CAN BE MODIFIED TO CONFORM TO THE BODY OF EVIDENTIARY STANDARDS NOW APPLICABLE TO ADJUDICATIONS BEFORE FEDERAL AGENCIES AND COURTS.	4
III. THE PETITION SHOULD BE GRANTED TO AVOID JEOPARDIZING THE INCENTIVE OF AN EMPLOYER, WHO DID NOT CAUSE THE INJURY IN THE FIRST PLACE, TO MAXIMIZE EFFORTS TO PROVIDE A SAFE AND HEALTHFUL WORKPLACE.	7
CONCLUSION	8

TABLE OF AUTHORITIES

CASES Page

Director, OWCP v. Greenwich Collieries, 512 U.S. 267 1994) 6

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 3

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 3

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 3

Travelers Ins. Co. v. Cardillo, 225 F2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955) ... *passim*

Washington v. Dawson, 264 U.S. 219 (1924) 3

STATUTES

Administrative Procedure Act, 5 U.S.C. § 556(d)... 6

Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* 7

Longshore and Harbor Workers' Compensation Act, 33 U.S. C. § 901 *et seq.* ..... *passim*

CODE OF FEDERAL REGULATIONS

29 C.F.R. §§ 1917 & 1918..... 7

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III, § 2, cl.1..... 3

IN THE

Supreme Court of the United States

No. 03-366

NEW ORLEANS STEVEDORES AND
SIGNAL MUTUAL ADMINISTRATION LTD.,
Petitioners,

v.

PEGGY IBOS, Surviving Spouse of Bertrand Ibos, Jr., and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The interests of *amicus curiae* in this matter are detailed in the accompanying Motion for Leave to File the Brief *Amicus*

[1] Pursuant to Rule 37.6, counsel states that they authored this brief in its entirety, and that no party has made a financial contribution to the brief other than members of *amicus* through their annual dues assessment. Pursuant to Rule 37(2)(b), counsel for Respondent Ibos has withheld consent to file this brief.

Curiae in Support of Petitioners, and in the interest of reducing the burden on the Court, will not be restated here but should be incorporated herein.

SUMMARY OF ARGUMENT

Amicus submits that the decision of the circuit court deserves review for three reasons. First, in the circumstances below, the 'last employer' rule, a substantive rule of maritime law, has been applied in a fashion that produces a legal fiction when it can just as easily be modified by the Court to produce a rule which is fundamentally fair to all covered employers involved in the employment chain. Second, the decision below should be reviewed to conform the rule to the body of evidentiary rules found in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA" or "Act") and the Administrative Procedure Act, 5 U.S.C. § 556 and this Court's controlling opinion in *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267 (1994). And finally, as applied below in holding an employer liable for a claim despite the evidentiary weight to the contrary, the rule creates a perverse incentive for some employers to ignore federal safety and health standards if they will be held responsible for a claim they did not cause. For these reasons, *amicus* submits that the Petition for Certiorari should be granted.

ARGUMENT

I. THE *CARDILLO* LAST EMPLOYER RULE ("*CARDILLO* RULE") IS AN EXTRA STATUTORY DEVICE CREATED BY THE FEDERAL COURTS AS PART OF THE SUBSTANTIVE MARITIME LAW OF THE UNITED STATES, AND NOW NEEDS TO BE REVIEWED AND MODIFIED BY THE COURT.

The power to regulate admiralty and maritime matters flows from the Constitution of the United States to the federal judiciary. Article III, § 2, cl.1. Unlike other areas of federal law, where the role of the federal courts is limited to interpretation, in the area of admiralty and maritime law, the federal courts have a far greater role. The Constitution grants the federal courts the power to interpret admiralty and maritime law, but also grants to the federal courts the power to develop on their own new substantive admiralty and maritime law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). The Court has noted that its power to regulate maritime law is shared with the Congress. *Washington v. Dawson*, 264 U.S. 219 (1924).

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA" or "Act"), is a product of this Constitutional structure. The LHWCA was enacted following this Court's holdings that states are preempted from regulating maritime commerce. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and that the authority to regulate maritime law is non-delegable to the states, *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). Therefore, states are constitutionally barred from applying state workers' compensation laws to maritime employees. In response to this constitutional bar, Congress enacted a federal workers' compensation statute to cover designated maritime employees—the LHWCA.

Not only is the LHWCA a product of this constitutional structure, but the rule of law at issue in this petition—the so-called *Cardillo* Rule—also hails from this structure even though it has no textual basis in the LHWCA whatsoever. Instead, this substantive rule of law was created some 50 years ago by the Second Circuit. *Travelers Ins. Co. v. Cardillo,* 225 F2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). While it has since been adopted by a number of other circuits, it has never been reviewed by this Court. With its application to the facts below, however, the *Cardillo* Rule has now evolved well beyond its original application to become the 'last employer, period' rule.

Amicus urges the Court to grant the Petition for Certiorari for the reasons outlined below. *Amicus* further urges the Court to take this opportunity to ratify the *Cardillo* Rule as part of the substantive admiralty and maritime law of the United States, while clarifying the contours of the rule to preclude its routine application by the Department of Labor to any employer designated the 'last employer, period'—regardless of the state of the evidence indicating that another employer is better held liable for the claim. *Amicus* submits that the Court should not allow the *Cardillo* Rule to become just another legal fiction, and asks the Court to use its constitutional maritime authority to refashion the rule in a way that takes into account scientific evidence pointing to a different last employer as the liable party.

II. THE PETITION SHOULD BE GRANTED SO THAT THE *CARDILLO* RULE CAN BE MODIFIED TO CONFORM TO THE BODY OF EVIDENTIARY STANDARDS NOW APPLICABLE TO ADJUDICATIONS BEFORE FEDERAL AGENCIES AND COURTS.

The fundamental policy underlying the LHWCA is that each covered employer is solely liable for work related injuries to his employees, and is to take steps to ensure

payment of benefits when necessary. With the notable court-made exception set out in *Cardillo*, the Act absolves other employers in the chain of employment from liability.[2]

As an initial matter, *amicus* stresses that the employers it represents have no quarrel with the application of the *Cardillo* Rule, or its rational as set forth by the *Cardillo* court, with the exception of the unusual evidentiary circumstances at the heart of the Petition. Indeed these employers long ago concluded that the *Cardillo* Rule is ordinarily a fair extra statutory device to assign liability—in lieu of apportionment—in claims involving several successive employers when the timeliness of causation cannot be pinned down with sufficient evidentiary certainty. Simply put, in this circumstance, when, as the last employer, 'it is your turn in the barrel,' you are tagged with the liability for the claim.

The same cannot be said, however, when applying the *Cardillo* Rule to certain claims—such as that below—which produce substantial, reliable, and relevant medical evidence advanced during the presumption-rebuttal stage to prove that work performed by a claimant during his tenure with the alleged last employer simply could not have been a factor in acquiring the underlying disease. *Amicus* suggests that the circuit court's blind application of the *Cardillo* Rule, ignoring the state of the reliable evidence found in the record, deprives the Petitioner, as well as every other employer yet to be cast as the last employer in similar circumstances, of its statutory right to rebut causation by producing substantial evidence to the contrary, as expressly allowed for by § 20(a) of the

---

[2] The LHWCA does allow the socializing of 'second injury' claims across the broad universe of covered employers. 33 U.S.C. § 944. But while Congress has required that all covered employers pay into this fund, regardless of whether or not an employer has ever placed a claim in the fund, its annual funding requirements are not based on any finding of employer liability by an ALJ, the Benefits Review Board, or the courts.

LHWCA, 33 U.S.C. § 920(a), and § 7(c) of the APA, 5 U.S.C. § 556(d). The circuit court's cold application of the *Cardillo* Rule in this circumstance effectively creates an irrebutable presumption and flies in the face of the Court's opinion assigning the burden of persuasion in APA governed adjudications to the claimant. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Amicus further notes that the circuit court glossed over the *Cardillo* court's underlying rationale in first crafting the rule. While acknowledging that the *Cardillo* court clearly crafted its rule due largely to the then poor state of available medical knowledge, the circuit court's decision ignores the ample scientific evidence presented below, as it appears the circuit is more concerned with avoiding apportionment of liability than with resolving the issue on a fair review of the evidence in the record.[3]

Thus, in order to cure the short-sighted application of the *Cardillo* Rule to claims such as that below, *amicus* suggests that the Petition for Certiorari be granted so that the *Cardillo* Rule can be modified to align it with the basic evidentiary policies of the underlying statutes, and this Court's all important APA jurisprudence.

---

[3] The notion that this is a choice between 'the last employer, period' and 'apportionment between' successive employers is a red herring. The choice need not be between these two extremes. In factual disputes which can be resolved with sufficient medical certainty, as below, a rule can be crafted assigning liability to the 'last responsible' employer, i.e., the last employer in the chain of employers who caused the injury.

III. THE PETITION SHOULD BE GRANTED TO AVOID JEOPARDIZING THE INCENTIVE OF AN EMPLOYER, WHO DID NOT CAUSE THE INJURY IN THE FIRST PLACE, TO MAXIMIZE EFFORTS TO PROVIDE A SAFE AND HEALTHFUL WORKPLACE.

If allowed to stand, *amicus* is concerned that the circuit court's decision will have a perverse effect on employee safety and, if for no other reason, it needs to be reviewed on this public policy ground. The members of *amicus* spend considerable time and funds to implement terminal safety programs in an effort to produce safe and healthful workplaces. Joint safety training programs are now required in an effort to reduce personnel accidents, injuries, and exposure to occupational disease causing agents, as well as to minimize cargo and equipment damage. The industry participated extensively and willingly over a number of years when the Occupational Safety and Health Administration ("OSHA") recently revised its two vertical standards applicable to longshoring and terminal practices. See 29 C.F.R. §§ 1917 and 1918. Today, many employer safety programs far exceed the OSHA minimum requirements.

Obviously, one of the principal motivating factors behind this effort is the reduction of work related LHWCA compensation and medical claims, which tend to be quite expensive in comparison with transportation industry norms. *Amicus* submits that the rote application of a substantive rule of law, as below, that holds an employer liable for a claim simply because it is the 'last employer, period' can only act as a disincentive for many employers to fully develop and implement innovative safety and health programs. If employers are going to be held liable for a claim which they did not cause in the first place, some are likely to reduce safety efforts and expenditures to the bare minimum. This possibility concerns *amicus*, as its members are dependent on

getting labor from a union hiring hall on a daily basis and need the critical skills of every member of the union in order to meet the ever increasing number of intermodal container movements. Even one unsafe workplace could result in a reduced supply of labor to the industry. Therefore, *amicus* submits that the Petition for Certiorari should be granted to review this important public policy matter.

CONCLUSION

For the aforementioned reasons *amicus* respectfully submits that the Petition for Certiorari should be granted.

Respectfully submitted,

CHARLES THOMAS CARROLL, JR.*
F. EDWIN FROELICH
CARROLL & FROELICH, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

* Counsel of Record

Counsel for Amicus Curiae